(2)

No. 85-713

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GUSTAV E. BEERLY, TRUSTEE OF THE GUSTAV E. BEERLY TRUST,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN, SECRETARY; COMPTROLLER OF THE CURRENCY; THE MID-CITY NATIONAL BANK OF CHICAGO; AND MID-CITCO INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BANK RESPONDENTS' BRIEF IN OPPOSITION

GEORGE B. CHRISTENSEN
(Counsel of Record For The Mid-City National Bank of Chicago and Mid-Citco Incorporated)
JOHN L. HUFF
Suite 5000
One First National Plaza
Chicago, IL 60603
(312) 558-5600

WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, IL 60603
Of Counsel

Pandick Midwest, Inc., Chicago • 733-6000

BEST AVAILABLE COPY

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT	3
I. The Petition Fails To Meet The Prerequisites For A Writ Of Certiorari	3
II. The Courts Below Correctly Concluded That The Comptroller Made A Fair, Accurate Appraisal Of Petitioner's Stock And That, In So Doing, The Comptroller Violated None of Petitioner's Statutory Or Constitutional Rights	4
A. The Court Of Appeals Correctly Held That Petitioner Was Awarded The Full Value Of His Bank Stock And That There Was No Unlawful Discrimination Against Petitioner	4
B. Petitioner's Contention That He Is Entitled To Receive The Liquidation Value Of His Bank Stock Was Not Raised In The Courts Below; And, In Any Case, Such Contention Is Wrong As A Matter Of Law	4
C. Because He Raised The Interest-Constitutionality Issue For The First Time In His Appellate Reply Brief, And Because The Court Of Appeals Properly Refused To Decide It, Petitioner Cannot Now Challenge The Constitutionality Of The Bank Merger Act	6
D. The Court Of Appeals Was Correct When It Held That Both The Text Of The Bank Merger Act And Its Application In This Case Comport With The Due Process Clause Of The Fifth Amendment	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

	PAGE
Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)	2, 5
Ahlenius v. Brenn & Humphreys, Inc., 358 Ill. 155, 192 N.E. 824 (1934)	5
American General Corp. v. Camp, 171 Md. 629, 190 A. 225 (1937)	5
Beerly v. Department of Treasury, 768 F.2d 942 (7th Cir. 1985)	1, 4, 6, 7
Chicago Corporation v. Munds, 20 Del. Ch. 142, 172 A. 452 (1934)	5
F.W. Woodward v. Quigley, 257 Ia. 1077, 133 N.W. 2d 38 (1965), *modified*, 257 Ia. 1077, 136 N.W. 2d 280 (1965)	6
Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941)	5
Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	2, 7
Mobil Oil Corp. v. F.P.C., 417 U.S. 283, 94 S. Ct. 2328, 41 L. Ed. 2d 72 (1974)	2, 3
NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)	5, 6
Simonds v. Guaranty Bank & Trust Co., 492 F. Supp. 1079 (D. Mass. 1979)	2, 3
Ramsey v. United Mine Workers, 401 U.S. 302, 91 S. Ct. 658, 28 L. Ed. 2d 64 (1971)	5, 6
Universal Camera v. NLRB, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951)	4

PAGE

Voeller v. Neilston Warehouse Co., 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322 (1941) 5

Constitutional Provisions

Fifth Amendment to the Constitution of the United States 7

Statutes And Rules

12 U.S.C. § 215a 7

Seventh Circuit Rule 9(e) 6

Other Authorities

Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv. L. Rev. 1453 (1966) ... 5

12B *Fletcher Cyclopedia Corporations* § 5805 (perm. ed. 1984) 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GUSTAV E. BEERLY, TRUSTEE OF THE
GUSTAV E. BEERLY TRUST,

Petitioner,

vs.

DEPARTMENT OF THE TREASURY, DONALD REGAN,
SECRETARY; COMPTROLLER OF THE CURRENCY;
THE MID-CITY NATIONAL BANK OF CHICAGO;
AND MID-CITCO INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT[1]

BANK RESPONDENTS' BRIEF IN OPPOSITION[2]

Respondents The Mid-City National Bank of Chicago and Mid-Citco Incorporated respectfully show that this case is unworthy of certiorari:

[1] The Seventh Circuit's opinion in this case is reported at 768 F.2d 942.

[2] Statement under Rule 28.1: Mid-Citco Incorporated is a Delaware corporation which, except for wholly-owned subsidiaries, has no subsidiary or affiliate. Mid-Citco has no parent. The Mid-City National Bank of Chicago is a chartered national bank which has no subsidiary or affiliate. Its parent is Mid-Citco Incorporated.

SUMMARY OF ARGUMENT

In this action to review the propriety of the Comptroller of the Currency's appraisal of petitioner's bank stock, both the district court and the court of appeals held that the agency decision was not arbitrary or capricious, that it was reasonable, and that the Comptroller gave petitioner due process. That issue has been decided twice in favor of the respondents and does not merit further review by this court. *Mobil Oil Corp. v. F.P.C.*, 417 U.S. 283, 310 (1974).

The petition does not raise any of the issues which establish normal grounds for review here. Two of the issues ("liquidation value" and interest) were not raised or decided below, and should not have been presented to this Court. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

Another issue (discrimination against minority shareholders) flies in the face of hornbook law, 12B *Fletcher Cyclopedia Corporations* § 5805 (perm. ed. 1984), and was correctly decided by the court of appeals.

The last issue (lack of evidentiary hearing) is controlled by *Mathews v. Eldridge*, 424 U.S. 319, 325, 344-45 (1976), which held that where, as here, there are no issues of credibility, procedural due process does not require an evidentiary hearing or even a limited oral prensentation.

Finally, the fact there is only one other reported case during the past 67 years in which an appraisal under the Bank Merger Act has been challenged (*Simonds v. Guaranty Bank & Trust Co.*, 492 F.Supp. 1079 (D. Mass. 1979)) shows that the statute is understood and is working well—the law is not in disarray. There is no need for clarification by this Court.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO MEET THE PREREQUISITES FOR A WRIT OF CERTIORARI.

Both the Seventh Circuit and the district court carefully considered the extensive administrative record and the Comptroller's written decision. Both courts concluded that the Comptroller's decision was not arbitrary or capricious, that the appraisal was based on a consideration of the relevant factors and was reasonable.

The petition does not contend that the decision below conflicts with a decision of this Court, another circuit, another panel of the Seventh Circuit, or the highest court of a state. It does not contend the court of appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the district court or Comptroller, as to call for an exercise of this Court's power of supervision. This is not truly a case of "first impression" as asserted by petitioner. It was established by *Simonds v. Guaranty Bank & Trust Co.*, 492 F. Supp. 1079 (D. Mass. 1979), that the Comptroller has the power to value dissenting shares in bank mergers but must do so in a reasonable way rather than by an arbitrary formula. All that the instant case adds is that the Comptroller need not hold a formal hearing but may act upon written submissions supplied by the interested parties.

The only issue really sought to be raised is a factual one—whether petitioner's stock is worth more than the appraised value established by the Comptroller. This Court will decide such an issue only in the rare instance where the "substantial evidence" standard of administrative review has been misapprehended or grossly misapplied. *Mobil Oil Corp. v. F.P.C.*,

417 U.S. 283, 310 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). That is not the case here.

II.

THE COURTS BELOW CORRECTLY CONCLUDED THAT THE COMPTROLLER MADE A FAIR, ACCURATE APPRAISAL OF PETITIONER'S STOCK AND THAT, IN SO DOING, THE COMPTROLLER VIOLATED NONE OF PETITIONER'S STATUTORY OR CONSTITUTIONAL RIGHTS.

A. The Court Of Appeals Correctly Held That Petitioner Was Awarded The Full Value Of His Bank Stock And That There Was No Unlawful Discrimination Against Petitioner.

Petitioner contends the Comptroller and both courts erred by finding that his shares were worth less per share than those of a controlling block of stock. (Pet. 4, 6-7.) Such contention flies in the face of hornbook law and common sense. As indicated by the lucid opinion of the court of appeals, it is axiomatic that a majority or controlling interest is more valuable than a minority interest. (App. A-9.) Federal law contains no requirement that all shareholders receive the same price for their shares. (App. A-9.) It is also established as a matter of general corporate law that a dominant or majority shareholder is under no duty to refrain from receiving a premium upon the sale of his controlling stock. *See* 12B *Fletcher Cyclopedia Corporations* § 5805 (perm. ed. 1984).

B. Petitioner's Contention That He Is Entitled To Receive The Liquidation Value Of His Bank Stock Was Not Raised In The Courts Below; And, In Any Case, Such Contention Is Wrong As A Matter Of Law.

Petitioner contends that, "Liquidation value is the only proper method of valuating bank stock in a merger situation." (Pet. 8.) This issue was not raised in either of the courts below,

and is not open for review here. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971).

Furthermore, petitioner's contention is wrong as a matter of law. Upon consolidation or merger of a corporation, appraisal of dissenters' stock must be upon a going concern basis, not a liquidation basis. *Ahlenius v. Brenn & Humphreys, Inc.*, 358 Ill. 155, 168-69 192 N.E. 824, 829-30 (1934); *Chicago Corporation v. Munds*, 20 Del. Ch. 142, 172 A. 452, 455 (1934); Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv. L. Rev. 1453, 1457 (1966) ("There is nearly complete agreement that book value does not accurately represent the fair value of corporate assets .... In most cases liquidation value of the assets is not an appropriate consideration.... Most courts generally prefer to look to the going concern value.")

The bank here (Mid-City) was not liquidated, sold to or merged with a third party. It was simply reorganized as the subsidiary of a bank holding company (Mid-Citco) created by the bank's management. Petitioner had the opportunity to exchange his shares in Mid-City for an equal number of shares in Mid-Citco.[3]

---

[3] Petitioner's reliance upon *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531 (1941) is misplaced because the corporation in that case was in liquidation, there was no appraisal of the dissenters' shares, and a state statute with peculiar appraisal prerequisites was at issue. None of these factors exist in the present case. *Lebold v. Inland Steel Co.*, 125 F.2d 369 (7th Cir. 1941) likewise does not apply because there, the majority shareholder fraudulently squeezed out the dissenters. *American General Corporation v. Camp*, 171 Md. 629, 190 A. 225 (1937) does not support petitioner's theory that liquidation value is the only proper method of appraising bank stock in a merger situation. The court held that "fair value" is the proper standard and

(Footnote continued on following page.)

The Comptroller considered and weighed the four classic factors for appraising petitioner's stock (book value, adjusted book value, market value and investment value) and appraised it at $282.39 per share. (App. E-3—E-8.) If there was any error, it favored petitioner because the Comptroller assigned zero weight to the market value of petitioner's stock which, at the time, was only $160.00 per share. (App. E-7.)

C. Because He Raised The Interest-Constitutionality Issue For The First Time In His Appellate Reply Brief, And Because The Court Of Appeals Properly Refused To Decide It, Petitioner Cannot Now Challenge The Constitutionality Of The Bank Merger Act.

Petitioner raised the interest-constitutionality issue (Pet. 9-10) for the first time in his appellate reply brief in violation of Seventh Circuit Rule 9(e) ("A reply brief shall be limited to matter in reply."). Therefore, the court of appeals refused to consider the matter. (App. A-13—A-14.) Although petitioner made passing reference in his complaint to nonpayment of dividends and interest, it was not part of the prayer for relief. Nor was it raised in his cross-motion for summary judgment. Therefore, the issue is not open here. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971).

(Footnote continued from preceding page.)

that, in addition to net asset value, such factors as market value and capitalization of estimated future income should be considered. 190 A. at 229. Finally, *F.W. Woodward v. Quigley*, 257 Ia. 1077, 133 N.W. 2d 38 (1965), *modified*, 257 Ia. 1077, 136 N.W. 2d 280 (1965), is inapposite because the corporation would have been liquidated but for the majority shareholders' decision to extend its existence perpetually.

D. The Court Of Appeals Was Correct When It Held That Both The Text Of The Bank Merger Act And Its Application In This Case Comport With The Due Process Clause Of The Fifth Amendment.

Petitioner challenges the constitutionality of 12 U.S.C. § 215a on the ground it fails to specify an evidentiary hearing before the Comptroller. (Pet. 10-13.) The court of appeals correctly rejected this contention, stating, "The only thing missing" from the hearing before the Comptroller "was oral testimony and the opportunity for cross-examination." (App. A-13.) As the district court observed, "No questions of credibility were involved." (App. D-10.) Thus, the appraisal procedure met constitutional muster under *Mathews v. Eldridge*, 424 U.S. 319, 325, 344-45 (1976) (neither an evidentiary hearing nor even a limited oral presentation is required when there are no issues of credibility).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE B. CHRISTENSEN
JOHN L. HUFF
WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, IL 60603

Counsel for Respondents
The Mid-City National
Bank of Chicago and
Mid-Citco Incorporated.

DATED: November 26, 1985.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that pursuant to Rules 28.3 and 28.5 (b) of the Rules of the Supreme Court, I this day served three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit upon counsel for the respondents, required to be served. Such service was accomplished by mailing the copies first-class and postage prepaid to counsel at the following addresses:

SAMUEL M. LANOFF
JAMES E. MCPARLAND
MORGAN, LANOFF, DENNISTON
& MADIGAN, LTD.
Two North LaSalle Street
Chicago, Illinois 60602

ANTON VALUKAS
District Attorney of
the United States
c/o Eileen M. Marutzky
219 S. Dearborn—Suite 1500
Chicago, Illinois 60604

FRANK BONAVENTURE
Comptroller of the Currency
Litigation Division
49 Le'enfant
Washington, D.C. 20024

Solicitor General
Department of Justice
Washington, D.C. 20530

GEORGE B. CHRISTENSEN
JOHN L. HUFF

By:_____
George B. Christensen

Dated: November 26, 1985